NO. 47251-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

BRIAN M. BASSETT,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

SUPPLEMENTAL BRIEF OF RESPONDENT

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The Appellant argues RCW 10.95.030(a)(ii) violates the Eighth Amendment to the United States Constitution and Article I, Section 14 of this state's constitution. The Court has asked for a response to this claim, along with a response to *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016).

A. RCW 10.95.030(3)(a)(ii) does not violate the Eighth Amendment of the Unites States Constitution.

The eighth amendment of the United States constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This provision is applicable to the states through the due process clause of the fourteenth amendment. See *Furman v. Georgia,* 408 U.S. 238, 239–40, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In *Miller,* the United States Supreme Court held that sentencing schemes imposing **mandatory** life without parole sentences on juveniles convicted of homicide offenses violate the eighth amendment. *Miller v. Alabama,* 132 S.Ct. at 2469.

Specifically, *Miller* requires that prior to sentencing juveniles to life without parole, a judicial authority must "take into account how children are different [from adults], and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Miller v. Alabama,* supra, at 2469. Thus, juvenile offenders facing life without the

possibility of parole are entitled to an individualized sentencing that considers the mitigating factors of their youth.

The decision in *Miller* precipitated the Washington State Legislature's enactment of the so-called "*Miller* fix" in RCW 10.95.030(3)(a)(ii). This also included the proviso in subsection (3)(b) that the sentencing "court must take into account mitigating factors that account for the diminished culpability of youth as provided in [*Miller...*] including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated."

The U.S. Supreme Court in *Montgomery v. Louisiana* again made clear that a **mandatory** life without parole sentence for a juvenile was prohibited, but that a sentencing court still had the discretion to impose such a sentence in the appropriate case. *Montgomery v. Louisiana*, 136 S.Ct. 718, 733-34 (2016).

Thus, there is no federal authority that would indicate that RCW 10.95.030(3)(a) is in violation of the eighth amendment. The statute comports with the requirements of *Miller* and its progeny.

B. RCW 10.95.030(3)(a)(ii) does not violate Article 1, Section 14 of the Washington State Constitution.

In *State v. Fain,* 94 Wash.2d 387, 617 P.2d 720 (1980), the Washington Supreme Court held the state constitutional provision barring cruel punishment is more protective than the Eighth Amendment. *State v. Rivers*, 129 Wash. 2d 697, 712, 921 P.2d 495, 502 (1996)

Under the Washington Constitution, to be "cruel and unusual," punishment must be grossly disproportionate to the severity of the crime—*i.e.,* " 'clearly arbitrary and shocking to the sense of justice.' " Washington courts have traditionally considered four factors in addressing claims of cruel punishment: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. *In re Haynes*, 100 Wash. App. 366, 375–76, 996 P.2d 637, 643 (2000), as corrected (May 19, 2000); See *State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980).

(1) The Nature of the Offense;

The offense at issue under RCW 10.95.030(3) is aggravated first degree murder. This is the most serious offense under Washington law and garners the most severe punishment. It is the only offense for which death can be imposed on an adult offender. These crimes not only result in the

death of a victim, but the crime is even more heinous due to some aggravating circumstance.

The Appellant asserts that "[t]he nature of the offense differs when the offender is a child or an adolescent." Appellant's Brief at 12. However, there is no legal authority that draws such a distinction. The courts have clearly differentiated between adults and juveniles when determining what *punishment* is appropriate, but this calculus does not change the nature of the actual criminal act.

(2) The Legislative Purpose Behind the Statute;

The amendment of RCW 10.95.030(3)(a) at issue in this case was enacted specifically to comply with the mandates of the U.S. Supreme Court in *Miller*. This amendment became effective on June 1, 2014. The Final Bill Report for 2SSB 5064 discussed *Miller v. Alabama* and the intent to have Washington comply with the sentencing requirements set forth by the Court. The report summarized *Miller* as follows:

> The court held when a youth is convicted of murder that occurred before age 18, the sentencing judge must focus directly on the youth and assess the specific age of the individual, the youth's childhood, and the youth's life experience; weigh the degree of responsibility the youth was capable of exercising; and assess the youth's chances of becoming rehabilitated. The judge can only impose a sentence of life without parole if the judge concludes the

> sentence "proportionally" punishes the youth, given all of the factors that mitigate the youth's guilt. The court reasoned that while it is not foreclosing the judge's ability to sentence a youth to life without parole, appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon.

See Attachment "A" – Final Bill Report 2SSB 5064.

(3) The Punishment the Defendant Would Have Received in Other Jurisdictions; and

The Appellant cites to "eight states [that] have abolished juvenile life without parole" and six additional states that have "functionally abandoned the sentence." Appellant's Brief at 14. However, that leaves 35 states that could potentially impose life without parole on a juvenile murderer.

The Washington legislature represents the will of the people and certainly could have abolished life without parole as an option, but like the vast majority of states, has not.

(4) The Punishment Meted Out for Other Offenses in the Same Jurisdiction.

The State acknowledges that life without parole is a sentence that is reserved for a small percentage of even adult offenders. It is available only in cases of aggravated murder or for adult offenders that have been labeled "persistent offenders." Washington also subjects certain sex

offenders to indeterminate sentences that can equal life in prison. These sentences are for the worst offenders and the worst crimes. The Appellant murdered three people, including a child, his crime's punishment is consistent with Washington's sentencing scheme.

By applying the test in *Fain* and recognizing that the U.S. Supreme Court has not foreclosed life without parole as an available sentence for juvenile murders, the Court should find that the Washington legislature has enacted a statute that comports with the eighth amendment of the U.S. Constitution and Article 1, Section 14 of the Washington State Constitution.

C. State v. Sweet

The language of the U.S. Constitution, Washington Constitution, and Iowan Constitution are almost identical regarding "cruel and unusual punishment."

U.S. Constitution -- Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Washington Constitution -- Article I, SECTION 14 EXCESSIVE BAIL, FINES AND PUNISHMENTS

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Iowa Constitution -- Article I Bail — punishments. SEC. 17.

Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.

However, in *State v. Sweet*, the Iowan Supreme Court found that life without parole for a juvenile offender unlawful under the state constitution while acknowledging that "[t]he United States Supreme Court left this issue open in *Miller.*" *State v. Sweet*, 879 N.W.2d 811, 817 (Iowa 2016). To reach a different conclusion from *Miller*, the Iowa Court noted that, "When a different standard is not presented under the Iowa Constitution, however, we apply the federal framework, reserving the right to apply that framework in a fashion different from federal precedents." *State v. Sweet*, 879 N.W.2d 817.

The holding in *Sweet* is obviously not binding on Washington courts, nor should it be found to be particularly persuasive. State laws must pass muster under the U.S. Constitution; however, there is no prohibition on the individual states offering more protection or tailoring an interpretation more narrowly than that given under federal law.

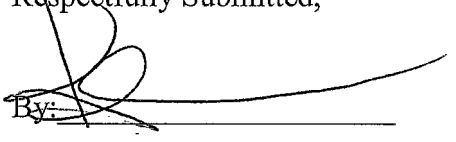
D. Conclusion

Each state must view this issue within the framework of its own constitution and body of case law. The Iowa Supreme Court does not apply the *Fain* factors and its decision does not comport with the case law of Washington. It is for the Washington courts to determine whether the legislature has enacted constitutionally sound legislation in RCW 10.95.030.

This Court should apply *Fain* as described above and find that RCW 10.95.030(3)(a) is constitutional under the U.S. and Washington State Constitutions.

DATED this 26 day of October, 2016.

Respectfully Submitted,



By: _____

FINAL BILL REPORT
2SSB 5064

C 130 L 14
Synopsis as Enacted

Brief Description: Concerning persons sentenced for offenses committed prior to reaching eighteen years of age.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove and Kline).

Senate Committee on Law & Justice
Senate Committee on Human Services & Corrections
House Committee on Public Safety
House Committee on Appropriations Subcommittee on General Government & Information Technology

Background: In June 2012 the United States Supreme Court (Court) held, in *Miller v. Alabama,* (10-9646), that the eighth amendment ban on cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile homicide offenders.

The court held when a youth is convicted of murder that occurred before age 18, the sentencing judge must focus directly on the youth and assess the specific age of the individual, the youth's childhood, and the youth's life experience; weigh the degree of responsibility the youth was capable of exercising; and assess the youth's chances of becoming rehabilitated. The judge can only impose a sentence of life without parole if the judge concludes the sentence "proportionally" punishes the youth, given all of the factors that mitigate the youth's guilt. The court reasoned that while it is not foreclosing the judge's ability to sentence a youth to life without parole, appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon.

Under Washington law, aggravated first degree murder occurs when a person commits first degree murder and one or more aggravating circumstances are present such as the victim was a law enforcement officer, firefighter, or other person engaged in official duties; the murder was committed in the course of a robbery, rape, burglary, kidnapping, or arson; or the murder was committed to maintain the person's membership or advancement in a gang. The crime of aggravated first degree murder is punishable by either a sentence of life imprisonment without the possibility of parole or, if sufficient mitigating factors are not present, the death penalty may be imposed. First degree murder, without aggravating factors, is punishable with a term of confinement between 23 and 40 years.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Currently there are 27 individuals serving life sentences in Washington State for aggravated first degree murders committed prior to their 18th birthday.

Summary: A youth who commits aggravated first degree murder must be sentenced to a 25-year minimum sentence if the youth committed the crime before age 16 or a minimum sentence between 25 years and life if the youth committed the crime at age 16 or 17. Life without parole is available within the discretion of the judge for youths who commit aggravated first degree murder at age 16 or 17. In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*.

A person who was sentenced prior to June 1, 2014, to a term of life without the possibility of parole for an offense committed prior to their 18th birthday must be returned to the sentencing court or the sentencing court's successor to set a minimum term consistent with the provisions of this act. The Court must provide an opportunity for victims and survivors of victims to present statements.

Any person convicted of one or more crimes committed prior to the person's 18th birthday may petition the Indeterminate Sentence Review Board (ISRB) for early release after serving no less than 20 years of total confinement provided the person has not been convicted for any crime committed after their 18th birthday, the person has not committed a major violation in the 12 months prior to filing the petition for early release, and the current sentence was not imposed under the aggravated first degree murder statute.

During the minimum term of total confinement, the person must not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, any other form of early release, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The Department of Corrections (DOC) must assess a youthful offender five years prior to release and provide programming to prepare the offender for reentry.

No later than 180 days prior to the expiration of the person's minimum sentence, DOC must conduct an examination of the offender to assist in predicting the dangerousness and likelihood that the offender will engage in future criminal behavior if released. The ISRB must order that the person be released unless it is determined by a preponderance of evidence that, despite conditions, it is more likely than not that the person will commit new criminal law violations if released. If the ISRB does not order that the person be released, a new minimum term not to exceed five years must be set for the person prior to future review. During the review of the person's suitability for release, the ISRB must provide an opportunity for the victims and survivors of victims to present statements.

If an offender is released after serving the minimum term of confinement, the offender must be subject to community custody under the supervision of DOC and the authority of the ISRB for a period of time as determined by the ISRB.

The Legislature must convene a task force to examine juvenile sentencing reform. Membership is prescribed, including four legislative members. The task force must

undertake a thorough review of juvenile sentencing as it relates to the intersection of the adult and juvenile sentencing systems, and make recommendations for reform that promote improved outcomes for youth, public safety, and taxpayer resources. The review must include, but is not limited to the following:

- the process and circumstances for transferring a juvenile to adult jurisdiction, including discretionary and mandatory decline hearings and automatic transfer to adult jurisdiction;
- sentencing standards, term lengths, sentencing enhancements, and stacking provisions that apply once a juvenile is transferred to adult jurisdiction; and
- the appropriate custody, treatment, and resources for declined youth who will complete their term of confinement prior to reaching age 21.

The expenses of the task force must be paid jointly by the Senate and the House of Representatives. The task force must report its findings and recommendations to the Governor and the appropriate committees of the Legislature by December 1, 2014.

Votes on Final Passage:

Senate	48	0	
House	74	23	(House amended)
Senate	48	1	(Senate concurred)

Effective: June 1, 2014

GRAYS HARBOR COUNTY PROSECUTOR

October 26, 2016 - 2:46 PM

Transmittal Letter

Document Uploaded: 7-472511-Supplemental Respondent's Brief.pdf

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Court of Appeals Case Number: 47251-1

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■ Brief: Supplemental Respondent's

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Cost Bill

Objection to Cost Bill

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Letter

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Personal Restraint Petition (PRP)

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Comments:

No Comments were entered.

Sender Name: Katherine L Svoboda - Email: ksvoboda@co.grays-harbor.wa.us

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